

14.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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GEORGE W. MILLER, )  
Administrator of the Estate of )  
Pedro Zumano Dimas, deceased, )

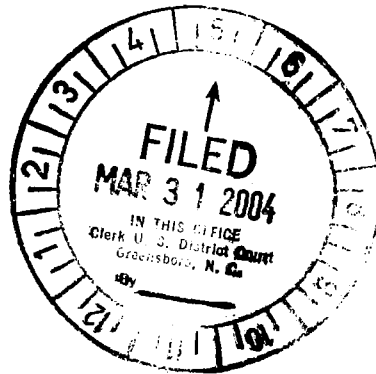
Plaintiff, )

v. )

CIVIL NO. 1:03CV00924

MOROCHO BROTHER'S )  
CONSTRUCTION, INC., a Florida )  
corporation; LUIS EDUARDO )  
MOROCHO; PROFESSIONAL )  
PLASTERING AND STUCCO, INC., )  
a Florida corporation; )  
DONNIE KING; and CONTRAVEST )  
CONSTRUCTION COMPANY, a )  
Florida corporation, )

Defendants. )



MEMORANDUM OPINION

BULLOCK, District Judge

Before the court is George W. Miller's ("Plaintiff") motion to remand this civil action to the General Court of Justice, Superior Court Division, Durham County, North Carolina, pursuant to 28 U.S.C. § 1447(c). For the following reasons, Plaintiff's motion to remand will be denied.

## FACTS

On August 22, 2002, Pedro Zumano Dimas, a citizen of Mexico, died while working on a construction project at an apartment complex near Morrisville, North Carolina. On August 4, 2003, Plaintiff, the administrator of Dimas' estate, filed this civil action in the General Court of Justice, Superior Court Division, Durham County, North Carolina, against three construction companies and two individuals allegedly responsible for Dimas' death. Plaintiff's complaint states separate claims for negligence and wrongful death against Morocho Brother's Construction, Inc. ("Morocho Construction"), a Florida corporation with its principal place of business in Orlando, Florida; Luis Eduardo Morocho, the president of Morocho Construction whose domicile and primary residence is in Florida; Professional Plastering and Stucco, Inc. ("Professional Plastering"), a Florida corporation with its principal place of business in Sanford, Florida; Donnie King, the president of Professional Plastering whose domicile and primary residence is in Florida; and Contravest Construction Company ("Contravest Construction"), a Florida corporation with its principal place of business in Lake Mary, Florida (collectively "the named Defendants").

On September 2, 2003, Plaintiff separately served Professional Plastering, Donnie King, and Contravest Construction with summonses and copies of the complaint. On October 1, 2003, Professional Plastering and Donnie King ("the removing Defendants") filed a notice of removal to this court pursuant to 28 U.S.C. §§ 1332(a)(1) and 1441(a). The removing Defendants apparently did not obtain consent from the other named Defendants before filing their notice of removal because Plaintiff's attorney had advised their attorney that Plaintiff had not yet served any of the other named Defendants and that none of the other named Defendants had retained counsel. (Defs.' Mem. Opp'n Pl.'s Mot. to Remand at 4; Neijna Aff. at 2.) The record does not show that Plaintiff ever properly served Morocho Construction or Luis Eduardo Morocho.

On December 8, 2003, Plaintiff filed a motion to remand this civil action to the General Court of Justice, Superior Court Division, Durham County, North Carolina. According to Plaintiff's motion to remand, "the failure of all the [named] Defendants to join in the Notice of Removal is fatal to removal, and requires that the case be remanded to North Carolina state court." (Pl.'s Mot. to Remand at 1-2.) The removing Defendants oppose Plaintiff's motion to remand as untimely based on the

provisions of 28 U.S.C. § 1447(c). (See Defs.' Mem. Opp'n Pl.'s Mot. Remand at 4.)<sup>1</sup>

#### DISCUSSION

"The right to remove a case from state to federal court derives solely from 28 U.S.C. § 1441[.]" Mulcahey v. Columbia Organic Chems. Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994) (citing 28 U.S.C. § 1441(a)). "Section 1441(a) of Title 28 permits a defendant to remove from state to federal court 'any civil action brought in a state court of which the district courts of the United States have original jurisdiction.'" Triad Motorsports, LLC v. Pharbco Marketing Group, Inc., 104 F. Supp. 2d 590, 593 (M.D.N.C. 2000) (citing 28 U.S.C. § 1441(a)). Actions over which federal courts have diversity jurisdiction "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). "Because removal jurisdiction raises significant federalism concerns, [courts] must strictly construe removal jurisdiction." Mulcahey, 29 F.3d

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<sup>1</sup>On December 15, 2003, Contravest Construction filed a separate objection to the removal of this action; however, Contravest Construction has neither joined in Plaintiff's motion to remand nor filed its own motion to remand.

at 151 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)).

"The existence of subject matter jurisdiction is a threshold issue, and absent a proper basis for subject matter jurisdiction, a removed case must be remanded to state court." Keith v. Clarke Am. Checks, Inc., 261 F. Supp. 2d 419, 421 (W.D.N.C. 2003) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S.83 (1998); Jones v. Am. Postal Workers Union, 192 F.3d 417, 422 (4th Cir. 1999); and Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp., 166 F.3d 642, 647 (4th Cir. 1999)). On a motion to remand, the burden of establishing federal subject matter jurisdiction rests on the party or parties seeking to preserve removal. Morales v. Showell Farms, Inc., 910 F. Supp. 244, 246 (M.D.N.C. 1995) (citing Mulcahey v. Columbia Organic Chems. Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994)); see also 14C Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3739, at 423-24 (3d ed. 1990) ("It is also well-settled under the case law that the burden is on the party seeking to preserve the district court's removal jurisdiction, . . . not the party moving for remand to state court, . . . to show that the requirements for removal have been met.")

"[W]hether an action should be remanded to state court must be resolved by the district court with reference to the complaint, the notice of removal, and the state court record at

the time the notice of removal was filed." Wright, Miller, and Cooper, supra, at 468. In the instant case, the removing Defendants' notice of removal alleges that the court has original jurisdiction of this civil action pursuant to 28 U.S.C. § 1332(a)(2).<sup>2</sup> Neither Plaintiff nor the removing Defendants dispute that complete diversity exists between Plaintiff and the named Defendants or that the amount in controversy exceeds \$75,000. Based on Plaintiff's complaint and the removing Defendants' notice of removal, the court finds that the requirements for diversity jurisdiction under 28 U.S.C. § 1332(a)(2) are satisfied.<sup>3</sup>

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<sup>2</sup>28 U.S.C. § 1332(a)(2) provides federal district courts with "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, . . . and is between . . . citizens of a State and citizens or subjects of a foreign state[.]"

<sup>3</sup>The named Defendants each qualify as citizens of Florida under the provisions of 28 U.S.C. §§ 1332(a)(2) and (c)(1). Although Plaintiff is an individual whose domicile and primary residence is in North Carolina, Plaintiff qualifies as a citizen or subject of Mexico under 28 U.S.C. § 1332(c)(2). 28 U.S.C. § 1332(c)(2) provides as follows, in pertinent part:

(c) For purposes of this section and section 1441 of this title --

. . . .

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(continued...)

Although the court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1332(a)(2), Plaintiff contends that the court lacks subject matter jurisdiction because all the named Defendants failed to join in the removing Defendants' notice of removal. "Section 1447(c) of Title 28 provides that a case removed to federal court must be remanded to state court if [at any time before final judgment] it appears that the federal court lacks subject matter jurisdiction[.]" Borneman v. United States, 213 F.3d 819, 824 (4th Cir. 2000) (citing 28 U.S.C. 1447(c)), cert. denied, 531 U.S. 1070 (2001). "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." 28 U.S.C. § 1447(c). Plaintiff filed his motion to remand over two months after the removing Defendants filed their notice of removal. Therefore, the issue presented by Plaintiff's motion to remand is whether the failure of all the named Defendants to join in or otherwise consent to the removing Defendants' notice of

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<sup>3</sup>(...continued)

The statutory definition of the term "State" does not include foreign states, see 28 U.S.C. § 1332(d); however, "[t]he most obvious and sensible meaning of [28 U.S.C.] § 1332(c)(2) . . . is that the representative of a decedent's estate is treated as having the citizenship of the decedent. Consequently, the representative of the estate of an alien is treated as an alien for purposes of diversity jurisdiction.'" Kato v. County of Westchester, 927 F. Supp. 714, 716 (S.D.N.Y. 1996) (quoting Geler v. Nat'l Westminster Bank USA, 763 F. Supp. 722, 726 (S.D.N.Y. 1991)).

removal qualifies as a defect in removal other than lack of subject matter jurisdiction for purposes of 28 U.S.C. § 1447(c).

28 U.S.C. § 1446 sets forth the procedure for removal, which a defendant or multiple defendants must follow in order to remove a civil action from state court to federal court. Section 1446(a) of Title 28 provides that "[a] defendant or defendants desiring to remove any civil action . . . from a State court shall file in [federal] district court . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal[.]" 28 U.S.C. § 1446(a). "A proper filing of a notice of removal immediately strips the state court of its jurisdiction." Yarnevic v. Brink's, Inc., 102 F.3d 753, 754 (4th Cir. 1996) (citing 28 U.S.C. § 1446(d) and State of South Carolina v. Moore, 447 F.2d 1067, 1073 (4th Cir. 1971)).

Courts have uniformly ruled that the phrase "a defendant or defendants" in 28 U.S.C. § 1446(a) requires all defendants in a civil action to join in or otherwise consent to a notice of removal filed under 28 U.S.C. § 1441(a). See Freeman v. Bechtel, 936 F. Supp. 320, 324-25 (M.D.N.C. 1996) (citing Gableman v. Peoria, Decatur & Evansville Ry. Co., 179 U.S. 335 (1900); Perpetual Bldg. & Loan Ass'n v. Series Directors of Equitable Bldg. & Loan Ass'n, Series No. 52, 217 F.2d 1 (4th Cir. 1954), cert. denied., 349 U.S. 911 (1955); Folts v. City of Richmond,



480 F. Supp. 621, 624-25 (E.D. Va. 1979); and Adams v. Aero Servs. Int'l, Inc., 657 F. Supp. 519, 521 (E.D. Va. 1987)).

"This 'rule of unanimity,' as it is referred to, does not require all of the defendants to sign the notice of removal; however, it does require that each defendant officially and unambiguously consent to the notice of removal." Parker v. Johnny Tart Enters., Inc., 104 F. Supp. 2d 581, 583-84 (M.D.N.C. 1999) (citing Mason v. Int'l Bus. Machs., Inc., 543 F. Supp. 444, 446 (M.D.N.C. 1982), and Martin Oil Co. v. Philadelphia Life Ins. Co., 827 F. Supp. 1236, 1237 (N.D.W. Va. 1993)). "[U]nder 28 U.S.C. § 1446(b), individual defendants have thirty days from the time they are served with process or with a complaint to join in [or consent to] an otherwise valid removal petition." McKinney v. Bd. of Trs. of Maryland Cmty. Coll., 955 F.2d 924, 928 (4th Cir. 1992).

Many courts have concluded that the failure of all defendants to join in or otherwise consent to removal is a procedural or non-jurisdictional defect in removal, which is waived unless it is raised in a motion to remand before the expiration of the thirty-day time limit imposed by 28 U.S.C. § 1447(c). See McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 653-54 (7th Cir. 1998); Balazik v. County of Dauphin, 44 F.3d 209, 213 (3d Cir. 1995); In re Ocean Marine Mut. Protection and Indem. Ass'n, Ltd., 3 F.3d 353, 356 (11th Cir. 1993); Johnson v.

Helmerich & Payne, Inc., 892 F.2d 422, 423 (5th Cir. 1990); Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988); Cornwall v. Robinson, 654 F.2d 685, 687 (10th Cir. 1981); see also Rashid v. Schenck Constr. Co., Inc., 843 F. Supp. 1081, 1085 (S.D.W. Va. 1993) (collecting cases); Winter v. Bassett, No. 1:02CV00382, 2003 WL 22014605, at \*1 n.2 (M.D.N.C. Aug. 19, 2003); Green v. Walker, No. 1:01CV01119, 2002 WL 1602459, at \*1 n.2 (M.D.N.C. June 5, 2002); and Page v. Heeman, M.D., No. Civ. L-93-372, 1993 WL 818743, at \*2 (D. Md. Oct. 1, 1993). A procedural or non-jurisdictional defect in removal within the meaning of Section 1447(c) "refers to any defect that does not involve the inability of a federal district court to entertain the suit as a matter of its original subject matter jurisdiction, which, according to Section 1441(a), would make the action nonremovable." Wright, Miller, and Cooper, supra, at 451.

Although the Fourth Circuit has not determined in a published opinion whether the failure of all defendants to join in or otherwise consent to removal is a procedural or non-jurisdictional defect in removal, Plaintiff cites the following language from an unpublished opinion issued by the Fourth Circuit to support his contention that the court lacks subject matter jurisdiction over this civil action because all the named Defendants failed to join in or otherwise consent to the removing Defendants' notice of removal:

All defendants must unanimously join in or consent to a removal action within [thirty] days of receiving service of the complaint. Because the filing requirements contained in 28 U.S.C. § 1446 are mandatory, there is no federal jurisdiction when one of the defendants fails to join in, file his own, or officially and unambiguously consent to, a removal petition within [thirty] days of service.

Wilkins v. Corr. Med. Sys., 931 F.2d 888 (Table), 1991 WL 68791, at \*2 n.2 (4th Cir. May 3, 1991) (citing Mason, 543 F. Supp. 444 (M.D.N.C. 1982); Albonetti v. GAF Corporation-Chemical Group, 520 F. Supp. 825 (S.D. Tex. 1981); and McKinney v. Rodney C. Hunt Co., 464 F. Supp. 59 (W.D.N.C. 1978)). After a careful review of the Fourth Circuit's unpublished opinion in Wilkins, the court finds the facts and precise holding of Wilkins inapposite to the facts of the instant case because there is no indication that the plaintiff in Wilkins filed an untimely motion to remand under 28 U.S.C. § 1447(c). Furthermore, the court is unable to determine whether the Wilkins court's statement that "there is no federal jurisdiction when one of the defendants fails to join in . . . or consent to a removal petition within thirty days of service" refers to a lack of removal jurisdiction, which is waivable under 28 U.S.C. § 1447(c), or a lack of subject matter jurisdiction, which is not waivable under 28 U.S.C. § 1447(c). See Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1543-44 (5th Cir.), cert. denied, 502 U.S. 963 (1991).<sup>4</sup>

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<sup>4</sup>Although courts often use the terms "removal jurisdiction"  
(continued...)

After considering the above cited cases, the court concludes that the failure of all defendants to join in or otherwise consent to a notice of removal constitutes a defect other than lack of subject matter jurisdiction, which is waived unless it is raised in a motion to remand within thirty days after the filing of the notice of removal under section 1446(a). See 28 U.S.C. § 1447(c). In the instant case, Plaintiff's complaint and the

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<sup>4</sup>(...continued)

and "subject matter jurisdiction" interchangeably, the issue of whether a court has subject matter jurisdiction and the issue of whether a court has removal jurisdiction involve separate considerations in the context of a motion to remand. With regard to a federal court's removal jurisdiction, the issue is whether a statutory basis exists under the removal statutes so that a federal court may assume jurisdiction of claims originally filed in state court. See Davenport v. United States, No. 3:02-0183-20BG, 2002 WL 1310282, at \*6 (D.S.C. June 11, 2002) (citation omitted). The scope of a federal court's removal jurisdiction may be narrower than the scope of its subject matter jurisdiction. For example, in an action filed against a citizen of North Carolina by a citizen of South Carolina in North Carolina state court where the amount in controversy exceeds \$75,000, 28 U.S.C. § 1441(b) would preclude the citizen of North Carolina from removing the action to federal court, even though complete diversity otherwise exists under 28 U.S.C. § 1332(a)(1) and federal subject matter jurisdiction is proper. See Zeigler v. Champion Mortgage Co., 913 F.2d 228, 230 (5th Cir. 1990); see also Hurley v. Motor Coach Indus., Inc., 222 F.3d 377, 379-80 (7th Cir. 2000) (Section 1441(b)'s resident defendant rule is non-jurisdictional and a plaintiff must object to removal on the basis of the presence of a resident defendant within thirty days under 28 U.S.C. § 1447(c)), cert. denied, 531 U.S. 1148, and reh'g denied, 532 U.S. 990 (2001); accord In re Shell Oil Co., 932 F.2d 1518, 1522-23 (5th Cir. 1991), cert. denied, 502 U.S. 1049 (1992); Woodward v. D. H. Overmyer Co., 428 F.2d 880, 881-83 (2d Cir. 1970), cert. denied, 400 U.S. 993 (1971); Am. Oil Co. v. McMullin, 433 F.2d 1091, 1094-95 (10th Cir. 1970); Sherman v. Sigma Alpha Mu Fraternity, 128 F. Supp. 2d 842, 844-45 (D. Md. 2001); and Ravens Metal Prods., Inc. v. Wilson, 816 F. Supp. 427, 428-29 (S.D.W. Va. 1993).

removing Defendants' notice of removal filed October 1, 2003, show that only two of the named Defendants joined in or otherwise consented to the removing Defendants' notice of removal. The failure of Contravest Construction to join in or otherwise consent to the removing Defendants' notice of removal clearly violates the procedure for removal prescribed by 28 U.S.C. § 1446; however, neither Plaintiff nor Contravest Construction filed a timely motion to remand before the expiration of the thirty-day time limit imposed by 28 U.S.C. § 1447(c) on the basis of Contravest Construction's failure to join in or otherwise consent to the removing Defendants' notice of removal.<sup>5</sup> As stated above, the court has original subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1332(a)(2). Therefore, Plaintiff's motion to remand this civil action pursuant to 28 U.S.C. § 1447(c) will be denied.

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<sup>5</sup>The failure of Morocho Construction and Luis Eduardo Morocho to join in or otherwise consent to the removing Defendants' notice of removal is irrelevant to the court's analysis of Plaintiff's motion to remand because a defendant who has not been served with process at the time a notice of removal is filed need not join in or consent to the notice of removal. See Parker v. Johnny Tart Enters., Inc., 104 F. Supp. 2d 581, 583 n. 3 (M.D.N.C. 1999) (citing Freeman v. Bechtel, 936 F. Supp. 320, 325 n.2 (M.D.N.C. 1996)).

# CONCLUSION

For the foregoing reasons, Plaintiff's motion to remand this civil action to the General Court of Justice, Superior Court Division, Durham County, North Carolina, will be denied.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

  
United States District Judge

March 31, 2004